# Professor Glenn Harlan Reynolds

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Mr. Brad Deutsch
Assistant General Counsel
Federal Election Commission
999 E. Street NW
Washington, DC 20463
Internet@FEC.gov

RE: *Comments on Notice 2005-10; Internet Communications*

Dear Mr. Deutsch:

I don't wish to occupy too much of your time raising legal points amply raised elsewhere, and I'd like to suggest that the comments already filed by The Online Coalition, the Center for Individual Freedom, and those drafted by Adam Bonin and filed by Duncan Black, Markos Moulitsas Zuniga, and Matt Stoller are particularly worthy of your attention in that regard.

My own point is a simple one: I believe that distinctions in terms of free speech between a "professional" media on the one hand, and the journalistic efforts of amateurs, including bloggers, on the other, are both inconsistent with the Constitution and – more importantly for my purposes – a dreadful idea.

They are unwarranted by the Constitution because the First Amendment's language regarding "freedom of the press" refers not to "the press" as an institution, but rather to the freedom "of the printing press" or "freedom in the use of the press" – that is, the freedom to publish, a usage found in some state constitutions of the time – and is thus a freedom enjoyed by all Americans, not simply by the institutional media.[1] That reluctance to create special privileges for the institutional press is

[1] See, e.g., Tenn. Const., Art. I sec. 19 ("That the printing press shall be free forevery person to examine the proceedings of the Legislature; or of any branch or officer of the government, and no law shall ever be made to restrain the right thereof. The free communication of thoughts and opinions, is one of the invaluable rights of man and every citizen may freely speak, write, and print on any subject, being responsible for the abuse of that liberty.) See also New York Times v.


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wise, and should be shared by the FEC. A "media exception" based on professional status, rather than the nature of the activity in question, would have no constitutional basis, and would have many pernicious effects.

In fact – and this is my main point – the creation of special privileges for the press to speak on matters of public consequence, privileges not enjoyed by other Americans, would likely lead to a drastic dilution of public support for the First Amendment, and for the electoral process. Instead of seeming to Americans like "our rights," freedom of speech and freedom of the press would come to seem like "their rights" – rights belonging not to all of us, but to an elite few, and rights that most Americans would feel no great stake in protecting. I leave for another time the question of whether the creation of such a privileged status would constitute a "title of nobility"of the sort prohibited by Article I sec. 9, but it would certainly violate the spirit of that provision, and of the Constitution. I can imagine few more effective ways of diminishing public regard for the political process than declaring unfettered political speech the domain of a narrow guild of favored professionals. Such an approach would likely produce widespread civil disobedience, along with (as Black, Moulitsas, and Stoller point out) the growth of anonymous and unaccountable bloggers, along with hostility to the entire process of campaign regulation.

Such a result, it seems to me, flies in the face of the Federal Election Commission's purpose. I encourage the Commission to extend the media exemption to cover online reporting and commentary, and echo the comments of Black, Moulitsas, and Stoller, in particular the following:

*Unless circumstances dictate otherwise, the Internet should be regulated no more stringently than any other medium.*

I recommend this principle as your touchstone throughout this rulemaking proceeding.

Sincerely,

Glenn Harlan Reynolds

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Sullivan, 376 U.S. 254, 275 (1964) (Quoting James Madison on "freedom in the use of the press.")

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